

¹ Amcor wanted to test the Replaced Meter to see if it did in fact under-bill Amcor's account, but ComEd threw the meter away before Amcor could test it. *See* Stipulation of Facts and Undisputed Testimony (the "Stipulation") ¶ 37.

look at whether the meter is giving accurate information for billing the customer is nevertheless a sufficient test of meter accuracy. Only lawyers could make these arguments. ComEd violates the fundamental tenet of statutory interpretation that words be given “their plain and ordinary meaning.” Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc., 2012 WL 4858995 at 6 (1st App. Dist. 2012).

Amcor is entitled to an Order prohibiting ComEd from back-billing Amcor.

Standards for Deciding the Motion for Judgment

The Stipulation (at p. 1) provides that it is the entire evidentiary record for this proceeding. The hearing on this Motion for Judgment is therefore the hearing on the merits; there will be no other hearing where the parties will present additional evidence. According to the Illinois Administrative Procedure Act, the standard of proof governing this hearing is preponderance of the evidence. 5 ILCS 100/10-15.

ComEd cites the standards for summary judgment in its Response (at p. 2). While Amcor believes its position is so clearly right that it meets these standards, Amcor is not required to meet them in order to prevail on its Motion for Judgment.

ComEd Violated ICC Regulation 410.155

ICC Regulation 410.155 provides in pertinent part that, “within 90 days after installation” of a meter, “a post-installation inspection shall be made under load to determine if the meter is accurately measuring customer energy consumption.” In Paragraph 21 of the Stipulation, ComEd acknowledges that it did not perform any testing of the Replaced Meter for more than four years after it was installed. ComEd’s failure to conduct a post-installation test of the Replaced Meter amounts to a blatant disregard of ICC directives. This failure to conduct post-installation inspections appears to be a routine ComEd practice.

ComEd responds in ways that require one to ignore both common sense and the plain meaning of the English language. First, ComEd acknowledges that the post-installation inspection under Regulation 410.155 is “for the purpose of determining ‘meter accuracy in measuring customer energy consumption’”² (Response, at p. 14), but then asserts that “meter accuracy is *not* the issue here.” *Id.* (emphasis in original). This simply makes no sense and has nothing to do with ComEd’s testing obligations under the Regulation. ComEd next asserts that “Amcor is flatly wrong in asserting that ‘ComEd did not test the Replaced Meter within 90 days of installing it’” because ComEd tested the meter on July 19, 2005 (*i.e.*, prior to the August 1, 2005 installation of that meter). Response, at p. 14. Since Regulation 410.155 requires a “post-installation inspection” to be made “under load” and “[w]ithin 90 days after installation,” ComEd’s argument again simply makes no sense. ComEd also references its alleged testing in September 2009, after the Replaced Meter was removed from service (Response at pp. 14-15); since this occurred more than four years after installation of the Replaced Meter (as opposed to within 90 days after installation), ComEd’s response is simply irrelevant.

Finally, ComEd argues that, while it admits it did not test the Replaced Meter within 90 days after installation (Stipulation, paragraph 21), its admission does not mean that it did not perform an “inspection to determine if the meter is accurately measuring customer energy consumption.” Response at p. 14. This attempt at verbal gymnastics fails. To begin with, there is no meaningful distinction between a test of the meter and an inspection to determine if it is accurate. Indeed, Merriam-Webster defines an “inspection” as “a check or testing of an individual against established standards.” *See* Exhibit A. It is preposterous for ComEd to suggest that it did not “test” the Replaced Meter to determine if it was accurate, but that it did “inspect” the meter to determine if it was accurate.

² This is not actually an accurate quote of Regulation 410.155.

Second, were there any significance to ComEd's point (in other words, if ComEd actually had conducted a post-installation inspection within 90 days after installation of the Replaced Meter), ComEd would present evidence of an inspection.³ It has not presented any, obviously because it failed to do anything to comply with ICC Regulation 410.155. Illinois law codifies common sense; ComEd's failure to produce evidence of a post-installation inspection leads to an evidentiary presumption that no such inspection occurred. Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 504, 840 N.E.2d 767, 779 (2nd Dist. 2005) ("An unfavorable evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control. [citation omitted].") *See also*, Illinois Pattern Jury Instructions - Civil, 5.01 Failure to Produce Evidence or a Witness.⁴ Even if ComEd had not stipulated that it failed to conduct a post-installation test of the Replaced Meter, an evidentiary presumption establishes this fact as a matter of law.

Far more than just a preponderance of the evidence shows that ComEd violated Regulation 410.155 by failing to conduct a post-installation inspection of the Replaced Meter within 90 days of installation.

ComEd Violated ICC Regulation 410.160

Regulation 410.160 requires ComEd to test meters for accuracy before placing them into service. It is undisputed that ComEd never tested to see if the data that the Replaced Meter reported when read was accurate. Stipulation, paragraph 35. ComEd therefore did not fully test the Replaced Meter to determine if it was accurate, and its testing of only part of the Replaced Meter's function did not comply with Regulation 410.160.

³ Given that Count II of the Formal Complaint alleges ComEd failed to conduct the tests required by ICC Regulation 410.155, ComEd cannot claim surprise.

⁴ <http://www.state.il.us/court/CircuitCourt/CivilJuryInstructions/5.00.pdf>

ComEd responds with still more verbal gymnastics. According to ComEd, it tested the Replaced Meter to confirm that it sent one pulse to the optiport memory for every 1.2 watt-hours of power going into the meter. Response at pp. 4-5; Stipulation, paragraph 34. ComEd then declares, over and over again, without explanation, that its test of this one function of the meter means the Replaced Meter was accurate. *See* Response at pp. 3, 4, 5, 9, 11, 12 and 15. Mere repetition does not make it so, however. ComEd never bothered to test the internal billing memory of the Replaced Meter (Stipulation, paragraph 35), which allegedly received an incorrect number of billing pulses and thus gave inaccurate usage data to meter readers (see Stipulation, paragraphs 25-28, 30 and 33). The billing memory is a critical part of the Replaced Meter—if it is inaccurate, the meter is inaccurate. After all, meters exist to record customer usage and provide that usage information to the utility for billing purposes; they do not exist to generate test pulses. ICC regulations requiring meters to be accurate, and requiring utilities to test meters to confirm that they are accurate, are obviously directed at making sure that the information meters provide for billing purposes (as opposed to test pulses) is accurate. “The reason and necessity” for the regulations must be considered in interpreting them. Illinois Insurance Guaranty Fund, 2012 WL 4858995, at 6 (discussing rules of statutory construction).

ComEd’s repeated, unsupported assertions that the Replaced Meter was accurate lead to absurd results. According to ComEd, a meter that gives completely inaccurate information when read is nevertheless accurate as long as it properly gives test pulses. The meter is accurate despite the fact that the information contained in the meter’s internal billing memory is completely wrong. According to ComEd, the Commission’s regulations requiring meters to be accurate (and requiring utilities to test the accuracy of meters) concern only test pulses—the Commission apparently does not care about the information the meter provides for billing when

it is read. For ComEd, the information a meter provides when it is read is not information about the customer's electricity usage—it is instead something completely different called “billing information.” (Response, at pp. 12-13). Nothing in the ICC Regulations supports such artificial interpretations of the Commission's requirements.

Tellingly, ComEd did not take these positions before its lawyers started writing briefs. Instead, in its December 9, 2009 correspondence to Amcor, ComEd states: “More importantly, both the installation of meters 141521021 and 141379885 as well as the recorder meter test demonstrates that the meter installed prior to the CT installation (meter 140384879) **was faulty.**” (Exhibit B to Stipulation, at p. 1) (emphasis added). “Meter 140384879, installed in 2005, was programmed with incorrect scaling factors thereby creating incorrect counts per revolution and **altered the metered usage.** Meaning, **the meter did not register all of the usage flowing** and under-billed Amcor's account by almost one third.” (Exhibit B to Stipulation, at p. 2) (emphasis added).⁵

In its Response, ComEd also makes excuses for its failure to test whether the Replaced Meter reported accurate usage information when read. For instance, ComEd's Response asserts that meters are programmed after it tests them (Response, at pp. 5, 12 and 15) and that programming zeros out any usage the meter records from testing. Response, at 12. To begin with, these assertions must be disregarded because they are merely unsworn, unsupported statements by lawyers in a brief—they are neither statements by witnesses nor part of the Stipulation nor part of the evidentiary record in this proceeding. Even if true, ComEd's lawyers' statements are meaningless; ComEd could just as easily test meters after programming. ComEd sends out bills to its millions of customers every month based on the difference between the last

⁵ The parties stipulate that ComEd sent the December 9, 2009 correspondence to Amcor. Stipulation, paragraph 17. Although the parties did not stipulate to the accuracy of the statements in the letter, these statements are admissible against ComEd as admissions of a party opponent. Illinois Rules of Evidence, Rule 801(d)(2).

meter reading and the one before; meters do not have to be zeroed out to measure electricity usage.⁶ Further, ComEd's alleged inconvenience neither permits it to disregard ICC Regulations nor eliminates the consequences of that disregard.

In another example of double-speak, ComEd also asserts that "the meter is not giving wrong information to the meter reader in terms of usage." Response, at p. 12; *see also* Response at p. 15. This flatly contradicts ComEd's own claims that the Replaced Meter caused Amcor to be under-billed. Further, ComEd itself claims that the scaling factor was incorrect (Response, at p. 6; Stipulation, paragraphs 32-33); that the scaling factor determines the number of billing pulses sent to the meter's billing memory (Response, at pp. 5-6; Stipulation, paragraphs 27-28); and that the meter reader records the number of billing pulses stored in the meter's billing memory. (Response, at p. 7; Stipulation, paragraph 30). As a matter of logic, if the scaling factor is wrong, the information the meter provides when read is wrong.

Again, far more than a preponderance of the evidence indicates that ComEd violated ICC Regulation 410.160 by failing to conduct an adequate and meaningful pre-installation test of the Replaced Meter, an error that, judging by ComEd's response, pervades its testing of all meters associated with instrument transformers.

ICC Regulation 410.200 Bars ComEd from Asserting the Back-Charge Claim

ICC Regulation 410.200 is titled "Corrections and Adjustments for Meter Errors."

410.200(h)(1) provides in pertinent part:

Corrections to metering data for under-registration may be accompanied by an adjustment to a customer's billing. **However, if an electric utility is providing metering service, in no case shall an adjustment to a customer's billing be**

⁶ ComEd's Response also states that it could only have discovered that the Replaced Meter was providing incorrect billing data if it conducted a "diagnostic test." Response at pp. 14 and 15. It is not clear how ComEd's decision to label something a "diagnostic test" means that it is not a test of meter accuracy under ICC Regulations 410.155 and 410.160. In any event, the tribunal must disregard these factual assertions since they are just unsworn arguments by the lawyers in a brief—the Stipulation does not contain any statements to this effect.

made for under-registration if all testing and accuracy requirements of this Part have not been met.

(Emphasis added.) The record evidence in this docket could not be clearer: ComEd failed to comply with ICC Regulations 410.155 and 410.160. ComEd contends there was a meter error of approximately 66%, far more than the 2% threshold. ICC Regulations 410.150, and 410.200(a), (b) and (d). The only “meter data” produced by a meter is that which is stored in its billing memory and downloaded when it is read; the test pulses do not create meter data. According to ComEd, the Replaced Meter under-registered usage. *See*, for example, Stipulation, paragraphs 18 and 33; Exhibit B to the Stipulation, p. 2 (the incorrect scaling factor “altered the meter usage. Meaning, the meter did not register all of the usage flowing...”). ComEd now seeks to adjust Amcor’s bill upwards by a factor of three. Stipulation, paragraph 18; Exhibit B to the Stipulation, at p. 2. The plain language of ICC Regulation 410.200(h)(1) prohibits ComEd from making this adjustment.

ComEd responds by arguing that ICC Regulation 410.200 does not refer to the type of error plaguing the Replaced Meter. Response, pp. 9-11, 15. This argument is apparently based on ComEd’s contention that the Replaced Meter was actually accurate. *See* Response, at p. 11 (“ComEd’s back-billing of Amcor is not based on meter accuracy testing” and that “no meter accuracy error was found on testing of the Replaced Meter either in the initial testing on June 19, 2005 or in testing after its removal from Amcor’s premises on September 24, 2009.”). As discussed above, however, ComEd’s argument that the Replaced Meter was accurate depends on specious word-play and contradicts its own contemporaneous explanation of what occurred; ComEd described the Replaced Meter in its December 9, 2009 correspondence (Exhibit B to the Stipulation, at p. 1) as “faulty.” This description is consistent with ordinary usage of the English language. A meter that has inaccurate information in its billing memory and reports the wrong

information when read is, using the plain meaning of the word, inaccurate. ComEd also apparently argues that Regulation 410.200 does not cover scaling factor errors because that type of error is not specifically identified in the regulation. Response, at 15. The Regulation, however, simply references “errors” generally (*see, e.g.*, 410.200(a) and (b)). There is nothing in the ICC Regulations that limits the meaning of “meter errors” or changes the meaning of “error” from its plain and ordinary meaning, and nothing supports the strained meaning ComEd ascribes to the term.

ComEd also tries to imply that the Replaced Meter’s under-billing is somehow different from under-registration. Response, at p. 11. Not only is the Replaced Meter’s alleged under-billing consistent with the common sense understanding of under-registration, but ComEd’s contemporaneous correspondence explicitly stated that the Replaced Meter had “altered the meter usage” and “did not register all of the usage flowing.” ComEd’s December 9, 2009 Correspondence (Exhibit B to Stipulation), at p. 2.

In addition, ComEd seems to argue that, even if the provisions of ICC Regulation 410.200 specifically bar it from asserting the back-bill claim, it can still back-bill pursuant to ICC Regulation 280.100 (billing for “Unbilled Service.”). Response, at p. 8. This position renders Regulation 410.200 a nullity. Every time a utility makes a billing adjustment because a meter under-registers, it will be seeking payment for unbilled service; thus, under ComEd’s position, there could never be a situation where a utility would be prohibited from adjusting a customer’s bill for under-registration even if, as here, the utility had ignored the ICC’s regulations regarding meter testing and accuracy. Basic rules of statutory interpretation do not permit interpretations that render parts of a statute a nullity. “Statutes are to be construed to give full effect to each word, clause, and sentence, so that no word, clause, or sentence is surplusage

or void. [Citations omitted.] Courts avoid interpretations which would render part of a statute meaningless or void [citation omitted], and the presence of surplusage will not be presumed [citation omitted].” Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd., 281 Ill. App. 3d 719, 724 (Ill. App. Ct. 1st Dist. 1996). *See also*, Aurora Manor, Inc. v. Department of Public Health, 2012 WL 4463237, at 3 (Ill. App. 1st Dist. 2012). Further, the more specific statute (here, Regulation 410.200 regarding when billing adjustments can and cannot be made for under-billing) controls over the more general statute (here, Regulation 280.100 regarding under-billing in general). Knolls Condominium Association v. Harms, 202 Ill. 2d 450, 459 (2002).

CONCLUSION

ComEd failed to comply with Commission regulations, and for the reasons stated above judgment in favor of Amcor is appropriate.

Respectfully submitted,

AMCOR FLEXIBLES, INC.

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By: Paul G. Neilan
One of its Attorneys

Bradley Block
Law Offices of Bradley Block
401 Huehl Road
Suite 2E
Northbrook, Illinois 60062
224-533-1075
224-533-1076 (fax)
brad.block@bradblocklaw.com

Paul Neilan
Law Offices of Paul G. Neilan, P.C.
33 North LaSalle Street
Suite 3400
Chicago, Illinois 60602
312-580-5483
312-674-7350 (fax)
pgneilan@energy.law.pro

Attachment:

Exhibit A – Definition of “inspection” excerpted from Merriam-Webster Dictionary Online

EXHIBIT A
DEFINITION OF “INSPECTION”

in·spec·tion

noun \in-spek-shn\

Definition of INSPECTION

1

a : the act of inspecting

b : recognition of a familiar pattern leading to immediate solution of a mathematical problem
<solve an equation by inspection>

2

: a checking or testing of an individual against established standards

Source:

<http://www.merriam-webster.com/dictionary/inspection>